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**International Brotherhood of Teamsters, Local 385  
(Freeman Decorating Services, Inc.) and Doris  
Caraballo.** Case 12–CB–208733

November 23, 2020

**DECISION AND ORDER**

BY MEMBERS KAPLAN, EMANUEL, AND MCFERRAN

On December 19, 2019, Administrative Law Judge Christine E. Dibble issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,<sup>1</sup> and conclusions, and to adopt the recommended Order.

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. November 23, 2020

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Caroline Leonard, Esq.*, for the General Counsel.

*Thomas J. Pilacek, Esq.*, for the Respondent.

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<sup>1</sup> The General Counsel excepts to several details of the judge’s factual findings about the Respondent and its operation of its referral system. We find no need to address each of the exceptions separately because, even if we were to find merit in all of them, it would not materially affect the relevant facts supporting dismissal of the complaint.

<sup>1</sup> All dates hereinafter are in 2017, unless otherwise indicated.

**DECISION**

**STATEMENT OF THE CASE**

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Kissimmee, Florida, on June 13, 2019. Doris Caraballo (the Charging Party/Caraballo) filed the initial charge on October 27, 2017, and the first amended charge was filed on March 27, 2018.<sup>1</sup> On March 30, 2018, the second amended charge was filed in case 12–CB–208733. On April 13, 2018, the General Counsel issued the complaint and notice of hearing against the International Brotherhood of Teamsters, Local 385 (Freeman Decorating Services, Inc.) (the Respondent).<sup>2</sup> The Respondent filed a timely answer denying all material allegations. (GC Exhs. 1(a)–1(x).)

The complaint alleges that from on or about November 1 through November 10, and from on or about December 1–4, the Respondent failed and refused to refer the Charging Party for employment with Freeman Decorating Services, Inc. (the Employer or Freeman) without providing the Charging Party with an opportunity to correct any alleged delinquencies in her union dues in violation of Sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act (NLRA/the Act).

On the entire record, including my observation of the demeanor of the witnesses, and

after considering the briefs filed by the General Counsel and the Respondent, I make the following

**I. FINDINGS OF FACTS**

*A. Jurisdiction*

Freeman, a Texas corporation with offices and places of business throughout the United States, including an office and place of business in Orlando, Florida, provides event and exhibition planning, setup, and management for conventions, expositions, corporate meetings, and trade shows. I find that in conducting its operations during the past 12-month period, Freeman performed services valued in excess of \$50,000 directly from points outside the State of Florida. I also find that Freeman is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Moreover, I find that since on or before January 18, 2013, the Respondent and Freeman have maintained a collective-bargaining agreement providing that the Respondent be the exclusive source of referrals of employees to Freeman for employment.

The Respondent admits, and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

*B. Overview of Respondent’s Operation*

The Respondent is a local branch of the International Brotherhood of Teamsters (IBT) and represents about 9000 individuals

<sup>2</sup> Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh.” for General Counsel’s exhibit; “R. Exh.” for Respondent’s exhibit; “CP Exh.” for Charging Party’s exhibits; “GC Br.” for General Counsel’s brief; “R Br.” for Respondent’s brief; and “CP Br.” for Charging Party’s brief.

who work in 15 to 17 counties in Florida in several industries for different employers, including Freeman. In its representational capacity, the Respondent has entered into about 53 to 55 collective-bargaining agreements (CBA) covering employees who work at the site of specific events ("show sites"). (GC Exh. 8.) The Respondent and Freeman also have a CBA which covers workers at Freeman's warehouse. (GC Exh. 7.) Beginning September 2016, Clay Jeffries (Jeffries) has been the Respondent's president; and Chris Gonzales (Gonzales) was its business agent for the Freeman account.

Since on or before January 18, 2013, the Respondent and Freeman have maintained a CBA specifying that the Respondent is the exclusive source of referrals of employees to Freeman for employment. (GC Exh. 8.) The parties also entered into a separate CBA covering all regular full-time and casual warehouse employees in the job classifications defined in addendum A of the CBA. (GC Exh. 7.)

### *C. Respondent's Referral System*

The evidence establishes that the Respondent has an exclusive hiring hall referral system with Freeman as set forth in the CBA and the Referral Rules.<sup>3</sup> (GC Exhs. 6–8.) Since Florida is a "right-to-work" state, however, the CBA between the Respondent and Freeman does not have a union-security provision. Members and nonmembers can use the month-to-month rotational referral system. (GC Exh. 6.) The CBA section 5.6 sets forth different deadlines for the employer to notify the Respondent of its need for employees. For calls of less than 20 employees the Respondent must fill the job request within at least 24 hours in advance of the time the workers must report to the jobsite; 20 workers or more the Respondent has 48 hours to fulfill the request; and on calls of 40 or more workers, the Respondent has 72-hour notice. Saturday and Sunday are excluded from these time limits. (GC Exh. 8.) Multiple job requests may be received daily, thereby increasing the urgency of responding to the job requests. See e.g., General Counsel Exhibit 11. The CBA guarantees only 4 hours of work per referral; and Freeman retains exclusive discretion on how long a referent will work. Freeman may also directly contact for job assignments referral hall users who are designated as "priority" users.

The application for placement on the referral list includes a completed registration packet that has a checkoff authorization form for members to authorize deduction of their membership from their paycheck and remitted to the Respondent by Freeman. As part of the application process, the referent must also pay 2 months of advance membership dues or referral fees, which covers the current month and subsequent month. Fee payment allows the referent to appear on a referral list generated during that month, and to be referred during any subsequent month. The

monthly membership fee for union members, and the referral list fee for nonmembers are \$65 per month. (GC Exh. 6.) Maintaining placement on the list after the first 2 months requires the referent to pay the membership or referral fee by the last business day of each month. (GC Exh. 6.) The referent will not appear on a referral list if the payment history does not indicate the fee has been paid through the end of the month. Consequently, the referent will not be referred until the dues or fee for that month is paid in full. If the referent pays after the first of the month, she or he will only appear on a referral list generated after payment is received. There are no penalties for a late or delinquent payment, as the referent becomes current by paying. Referents may also pay dues or fees in advance. The Respondent does not notify referents if their dues or fees are delinquent.

Once the application package is completed and the referral dues or fees are paid, referents are given copies of the referral rules.<sup>4</sup> (GC Exh. 6; R. Exh. 2.) The referents must sign a form acknowledging that they received the rules. The referral rules include a statement that dues or fee payments are a personal responsibility, regardless whether a person makes payment via checkoff.

Referents can utilize one of two methods for paying dues or fees, self-pay or authorize a checkoff authorization agreement. A checkoff authorizes and obligates Freeman to deduct union dues or referral fees from an employee's paycheck. Nonmembers who agree to checkoff receive a "blue card." Union members who agree to checkoff receive a "white card." Under a checkoff agreement, Freeman remits payment to the Respondent on a monthly basis by the fifteenth day of the subsequent calendar month. The Respondent will not receive remittance until the 3rd month if a Freeman payroll period during a checkoff extends into the next month.<sup>5</sup> (Tr. 73, 121–122.) Members and nonmembers can make dues or fee payments in cash to maintain eligibility during the payment gap period. (Tr. 103, 118.) Individuals must be current in their dues or fees when a referral list is generated otherwise their name will not appear on the list for a referral.<sup>6</sup> The CBA contains a notice to the members about members' responsibility regarding checkoff payments which reads:

### NOTICE TO ALL MEMBERS

IF YOU ARE ON A DUES CHECK-OFF WITH YOUR COMPANY AND LEAVE FOR ANY REASONS AND DUES ARE NOT DEDUCTED, IT IS YOUR RESPONSIBILITY TO KEEP YOUR DUES CURRENT OR REQUEST A WITHDRAWAL CARD FROM THE LOCAL UNION OFFICE.

IF YOU BECOME UNEMPLOYED IN THE

<sup>3</sup> The list relevant to the issue at hand is the convention referral list which the Respondent uses to refer hiring hall users for jobs as general laborers or forklift operators. The Respondent estimates that Freeman is the largest user of this list.

<sup>4</sup> The referral hall rules in effect during the period at issue are dated March 18, 2017. (GC Exh. 6.)

<sup>5</sup> The Respondent explains, "If a Freeman payroll period during which a checkoff is made extends into the next month, LOCAL 385 will not receive the remittance until the following, third, month. For example,

if referral fees for work during the last week in September are checked off during a payroll period which ends in October, the Union will not receive the remittance until mid-November." (R. Br. 7.)

<sup>6</sup> A person is immediately eligible for referral once their dues or fee payment is received by the Respondent. If the payment is made and received after the first day of any current month, the person will appear on referral lists generated from that date until the end of the month, but their name will not appear on any lists generated prior to their payment.

JURISDICTION ON THE LOCAL UNION, YOU WILL BE ISSUED A WITHDRAWAL CARD ON REQUEST PROVIDING ALL DUES AND OTHER FINANCIAL OBLIGATIONS ARE PAID TO THE LOCAL UNION, INCLUDING DUES FOR THE MONTH IN WHICH THE WITHDRAWAL CARD IS EFFECTIVE.

FRATERNALLY,

CLAY JEFFRIES

SECRETARY-TREASURER

(GC Exh. 8.) Article IV of the CBA also addresses procedures the Employer and the Respondent will use to implement hiring hall user payments through check-off. *Id.*

#### *D. TITAN and Checkoff*

The Respondent uses a computerized systems, TITAN, to make and track hiring hall referrals, job terminations, and referents' individual certifications. TITAN also calculates dues and fee payment status based on a preprogrammed algorithm. Moreover, TITAN is programmed to place referral hall users on referral lists according to users' sign-in (SI)<sup>7</sup> date; and the list operates on a rotational basis.<sup>8</sup> The most recently referred person should appear near the bottom of the list, while the least recently referred person appears near the top of the list. A person is eligible to be notified of a referral opportunity when the person's name appears on the "out of work list" and is current on their dues or referral fees. When the referent finishes an assignment, the person is automatically placed at the end of the rotation. (Tr. 131–132.) TITAN also stores referents' contact information, dispatch history, and payment information. (Tr. 46, 51.) There is no evidence that the Respondent, as the local union branch, programs or has any input into the programming of TITAN. Neither TITAN nor human operators verify that a check-off referent is performing work for Freeman which will result in dues or fees incoming by the fifteenth of the following month. (Tr. 122–123, 152–153.)

Nidia Grajales (Grajales) is the referral hall administrator who is responsible for referring hiring hall users to employers seeking workers for temporary job assignments. She contacts hiring hall users based on their placement on the referral list generated by TITAN.<sup>9</sup> After being notified that a person has completed a job, Grajales provides that information to a staff member who inputs it into TITAN. Although Grajales does not notify hiring hall users if they are delinquent on dues or referral fees, she does make notations on the referral lists indicating when Freeman remits dues to the Respondent via check-off. (Tr. 84–89.) Moreover, if hiring hall users ask her if their dues or fees are current, she

tells them to contact the "dues person."<sup>10</sup> (Tr. 85.)

Between November 1, 2017 to January 2, 2018, Lauren Stapleton (Stapleton) was the bookkeeper. Among her duties, she was responsible for inputting dues and referral fees into TITAN and responding to questions about referents' payments.<sup>11</sup> (Tr. 36–37, 75, 89–90.) She also, when requested by Grajales, generated a new referral list for her.<sup>12</sup> Stapleton did not typically contact hiring hall users to notify them that they were not current on their dues or referral hall fees. However, if the referent asked about the status of their dues or fees, Stapleton gave them the information. The checkoff remittances of hiring hall users are submitted from Freeman to the Respondent via check and an electronic file.<sup>13</sup> The electronic file is entered into TITAN and posted to the hiring hall users' ledgers. Once the information is in TITAN, Stapleton ensures the accuracy of the users' payments. She ascertains whether the check-offs and the electronic files reflect the same amount; and if accurate, the payments are simultaneously posted electronically to all of those hiring hall users' ledgers. (Tr. 133–134.) It should be noted that there are also users who are not on checkoff; and those people can choose to pay their dues or referral fees any number of months in advance.

#### *E. Charging Party's Referrals from September 2017 to November 2017*

Caraballo has used the Respondent's hiring hall for several years; and on February 9, 2015, authorized Freeman to remit her dues to the Respondent via checkoff. Despite having a check-off authorization form on file with Freeman, on August 31, 2017, the Caraballo paid her September dues with a personal check. (GC Exhs. 9, 12.) Consequently, on the Respondent referred her to Freeman for September 28 and 29. (GC Exh. 2.) On September 25, Caraballo used an electronic check to pay her October dues. (GC Exhs. 9, 12.) The Respondent referred her to work with Freeman for October 5. (GC Exh. 2.)

On October 6, Caraballo received a paycheck from Freeman for the period of September 26 to October 1, which reflected that her dues were withheld through the checkoff provision. (GC Exhs. 3, 12.) However, the paycheck she received on October 13, showed no dues were withheld. (GC Exh. 3.) Freeman did not remit the September paycheck dues to the Respondent on October 15.<sup>14</sup> (GC Exh. 9.)

Freeman needed workers for a show, "American Society of Human Genetics" (the Genetics show), held on October 20–21. (GC Exhs. 2, 3, 4.) Caraballo and ten other individuals were referred at the same time to work on the show. The other referents are: Christopher Cobb (Cobb), Maxo Estinvil (Estinvil),

<sup>7</sup> Stapleton definition of SI lacked a clear explanation of its meaning. She merely explained that TITAN used the SI date to determine hiring hall users' placement on referral lists. (Tr. 59–60.) Neither party presented a more complete definition of the term "SI".

<sup>8</sup> "Priority" workers do not need a referral using the rotation list. (R. Exh. 7; Tr. 93.) Charging Party was not a priority worker from November 1, 2017, to December 4, 2017. (R. Br. 19.)

<sup>9</sup> Grajales is also the Respondent's business agent and trustee.

<sup>10</sup> Based on the totality of the evidence, it appears the "dues person" referenced in Grajales testimony is the Respondent's bookkeeper. Lauren Stapleton was the bookkeeper during the relevant timeframe.

<sup>11</sup> Michele Concanon is currently employed as the bookkeeper.

<sup>12</sup> Grajales asks Stapleton for a new referral list when she has "exhausted" one or wants a list reflecting the most recent dues and fees remitted by Freeman. (Tr. 52, 56, 89.)

<sup>13</sup> The electronic file contains the hiring hall users' names, social security numbers, and the amount of the dues the employer is remitting on the persons' behalf.

<sup>14</sup> In prior instances, Caraballo had self-paid in cash to be current. (Tr. 103–104; R. Exh. 1; GC Exh. 9.)

Isabel Hernandez (Hernandez), Diana Millan (Millan), Pedro Osorio (Osorio), Alba Palomino (Palomino), Matthew Rausch (Rausch), Alex Santiago (Santiago), Nina Thomas (Thomas), and Hector Velez (Velez).<sup>15</sup> (GC Exh. 4.) After Caraballo worked the Genetics show, on October 27 Freeman issued her a paycheck with no dues withheld. (GC Exhs. 2, 3, 4.)

On November 1, Stapleton generated a call list for Grajales to use to fill a jobs request order from Freeman for several events, including a show entitled “IAAPA.” (R. Exhs. 5, 6.) The job request was for 50 forklift drivers and 28 general laborers. (R. Exhs. 5, 6.) Since the Respondent had not yet received the Caraballo’s withheld dues from Freeman, she did not appear on the referral list. (R. Exhs. 6; Tr. 9.) The Respondent did not notify her of the nonpayment. (Tr. 73, 97–98.) Eight of the 10 persons referred with the Charging Party for the Genetics show—Cobb, Hernandez, Millan, Osorio, Palomino, Rausch, Thomas and Velez—were also referred to work the IAAPA show.<sup>16</sup> (GC Exh. 5; R. Exhs. 5, 6.)

In an apparent attempt to resolve the problem concerning her dues status and have her name returned to the referral list, on November 8, Caraballo e-mailed Stapleton and Gonzalez for the Respondent’s fax number, so she could send them her payment records. (GC Exh. 12.) Stapleton informed Caraballo that the Respondent records showed her dues were paid through October but not for November. (GC Exh. 12.) Caraballo provided Stapleton her canceled checks for dues payments made in September and October. Stapleton noted in part,

We did not receive any dues on you in October from Freeman. As you know the dues arrive around the 15th of the following months they were deducted in. n this case they won’t arrive until November around the 15th. Which means you will be off the list for work until dues arrive since we are already in the month of November. Right now you are currently no on the list until you pay for the month of November.

(GC Exh. 12.) Consequently, Caraballo did not receive any referrals from the Respondent from November 1–10. On November 16, the Respondent received from Freeman by check-off Caraballo’s dues. (GC Exh. 9; Tr. 71–72.)

#### F. Respondent’s Referrals in December 2017

The Respondent did not refer Caraballo for job assignments from December 1 through December 4. Jefferies provided undisputed testimony that only “priority” referrals were made from December 1–4. (Tr. 144; R. Exh. 7.) On December 4, Caraballo paid her dues with a personal check, thereby becoming eligible for job referrals that became available from December 4–31.<sup>17</sup> Caraballo, Cobb, Estinvil, Millan, Osorio, Rausch, Santiago, Thomas, and Velez, received work beginning January 2, 2018.

<sup>15</sup> The General Counsel refers to the 10 employees as “the comparators”.

<sup>16</sup> Santiago worked as forklift driver on IAAPA, although there is no documentation in the record that he was current in his dues or appeared on the call list created on November 1. Likewise, there is no definitive evidence that he was in arrears in dues payments. (GC Exhs. 2, 5; R. Exhs. 2, 5, 6.)

### III. DISCUSSION AND ANALYSIS

#### A. Complaint Allegation

The General Counsel contends that the Respondent violated the Act by failing and refusing to provide the required notice and opportunity for Caraballo to pay her referral fee, thereby deny her employment opportunities with Freeman. Specifically, counsel for the General Counsel argues that when the Union operates an exclusive hiring hall with mandatory referral fees, Board law holds that Respondent has a “fiduciary duty” to notify referents and provide them with an “opportunity to correct delinquent dues/referral fees *before* denying them the opportunity to be referred for work.” (GC Br. 13.) The General Counsel also asserts that there is evidence that Respondent’s action was “arbitrary and in bad faith.” (GC Br. 15.) The Respondent counters that the General Counsel’s position has been rejected in a federal appellate court decision<sup>18</sup> “in a non-union security context and has never been re-alleged since then where no union security agreement exists, including in a “right-to-work” state . . . ; and the General Counsel’s position is “unfair to those who have paid their referral fees by giving preference to those who have not . . . .” (R. Br. 2.)

Section 8(b)(2) of the Act provides that it is an unfair labor practice for a labor organization or its agents “to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.”<sup>19</sup>

Section 8(b)(1)(A) of the Act provides that it is an unfair labor practice for a labor organization or its agents “to restrain or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.” The rights guaranteed in Section 7 include, in relevant part, the right “to form, join or assist labor organizations . . . and the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorize in Section 8(a)(3) . . . .”

The case at issue involves the Respondent’s exclusive hiring hall referral system and the implementation of its internal rule regarding the payment of dues or fees. In *Stagehand Referral Service*<sup>20</sup> the Board explained, “The Supreme Court has upheld the legality of hiring hall referral systems, acknowledging that “the very existence of a hiring hall encourages union

<sup>17</sup> The General Counsel noted that on or about November 19, the Respondent returned nine of the comparators to the referral list. Santiago worked as a forklift driver for a show on December 14 and 15.

<sup>18</sup> *Radio-Electronic Officers Union v. NLRB*, 16 F.3d 1280, 1284–1285 (D.C. Cir. 1994), cert. den. 513 U.S. 866 (1994).

<sup>19</sup> An 8(b)(2) violation has as a derivative an 8(b)(1)(A) violation. *Jacoby v. NLRB*, 233 F.3d 611, 618 (2000); *NLRB v. Iron Workers Union, Local 433*, 767 F.2d 1438, 1440 (1985).

<sup>20</sup> 347 NLRB 1167, 1170 (2006).

membership,” but holding that “the only encouragement or discouragement of union membership banned by the Act is that which is ‘accomplished by discrimination.’” [citations omitted.] In *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), the Board explained that there is a rebuttable presumption that arises when a union interferes with an employee’s employment status for reasons other than the failure to pay dues, initiation fees, or other fees uniformly required, that the interference is intended to encourage union membership:

When a union prevents an employee from being hired or causes an employee’s discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power. But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.

Thus, the Respondent bears the burden of establishing that its referrals are made pursuant to a valid hiring hall provision, or that its failure and refusal to refer the Charging Party for job assignments was “necessary for effective performance of its representational function.” *Radio-Electronic* at 1284.

The Respondent argues that its “referral system rules, requirements and procedures are inherently neutral, uniform, and fair to all users of the referral system.” (R. Br. 11.) More specifically, the Respondent insists that: (1) the payment requirement is applied nondiscriminatorily and Caraballo was aware of the requirement; (2) the General Counsel’s position has been rejected in *Radio-Electronic*; and (3) the payment requirement is necessary for the effective operation of its referral system.

I find the Respondent’s argument on point number one persuasive. According to the Respondent, its use of an automated computer program with built in randomized features (TITAN), and the dual administration by Grajales and Stapleton of the referral program ensures a referral program that is free from bias. The charge against the Respondent stems from the implementation of its rule which authorizes the Respondent to refuse to refer a referral hall user for work until he or she has satisfied unpaid dues or referral fees. As noted earlier, in order to be eligible for referrals the referents must pay their dues/fees either in cash or through check-off for the months the referents want to work. It is undisputed that, unless asked by the referent, the Respondent does not notify referral hall users if they are not current on their dues/fees. Respondent argues the TITAN system precludes discrimination in the referral procedure because the Respondent does not control the information programmed into the system. However, the evidence is to the contrary. It is undisputed that Stapleton was responsible for inputting referents dues and fees into TITAN.

Nonetheless, there is no credible evidence that the Respondent routinely veered from its long-standing practice of using an automatic computerized system to determine referents’ place on referral lists. *Glaziers Local Union 558 v. NLRB*, 787 F.2d 1406, 1414-16 (10th Cir. 1986) (union rebutted presumption of

illegality where it established that it acted in compliance with long-standing internal referral practice); *Radio-Electronics* (court found “necessity defense” established because of the union’s long-standing practice of automatically deleting members who failed to pay their dues from the job referral list without advance notice). As the Respondent receives union dues and referral fees and refers or terminates referents’ job assignments, TITAN is being continually updated. The Respondent admits that Stapleton inputs data into TITAN. Stapleton provided undisputed testimony that if Grajales has exhausted her referral list after receiving a labor request from an employer, Grajales asks Stapleton to generate a new referral list. Grajales gives Stapleton the referral list she exhausted with her notations chronicling the referent’s start date and location for accepted work; their availability; and whether she had to leave a message for the referent. Stapleton then enters into TITAN the names of referents Grajales used to fill the labor request before giving Grajales a new referral list. She also inputs into the dispatch section of the TITAN database, showing the employer, referent’s start date, and job designation. Consequently, information in the TITAN database is not totally free of human biases and opportunity for manipulation. (Tr. 5154; 58; GC Exhs. 10, 11.) Despite this human intervention in TITAN, there is no evidence that the Respondent routinely deviated from its long-standing procedure for placing referents on the referral on a rotational basis automatically generated by TITAN. Moreover, the General Counsel did not establish that on the few occasions one of the Respondent’s staff made or added changes to TITAN, the action was intentionally (or unintentionally) taken in order to prejudice a nonunion member or any other referent. While Grajales and Stapleton’s actions may lend themselves to abuse, they are not unlawful per se. See, *Morrison-Knudsen Co.*, 291 NLRB 250 (1988) (upholding union hall referral requirement despite it being based on subjective criteria).

The Respondent also argues that the General Counsel’s case against it fails because subsequent to *Radio-Electronics*, “there has been no Board decision which has applied the strict “notice” requirement to a union’s referral system where no union security agreement existed.” (R. Br. 14.) In *Radio-Electronics* the union operated an exclusive hiring hall which did not contain a union security clause. Pursuant to its hiring hall rules, the union delisted the charging party from its “on-hand” list because he failed to pay his quarterly union dues. In affirming the administrative law judge’s finding, the Board found that, the lack of a union security clause notwithstanding, when a union operates an exclusive hiring hall it has a duty of fair representation to all users; and in this setting “whenever a union prevents an employee from being hired, it demonstrates its power and influence over his livelihood so dramatically as to compel an inference that the effect of the union’s action is to encourage union membership on the part of all employees who have perceived the display of power.” *Radio-Electronics* at 44. Consequently, the Board found that even in a situation where the union operates an exclusive hiring hall but the CBA does not include a union security clause, the Union still has a duty to notify members and nonmembers who use the hiring hall of any delinquent dues or fees and give them a reasonable opportunity to cure the defect before removing their names from the referral lists. *Id.* On appeal, the Court denied enforcement of the Board’s order concluding that the “stringent

notice standard” is not applicable to cases where a union security clause does not exist. I reject the Respondent’s argument on this point because NLRB administrative law judges are required to follow Board law that has not been reversed by the Board or the Supreme Court, regardless of different rulings by lower federal courts. See, *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004). Nevertheless, the Respondent may still rebut the “presumption of illegality” by showing that the action it took “was necessary to the effective performance of its function of representing its constituency.” *Road Sprinkler Filters Local Union No. 669 v. NLRB*, 778 F.2d 8 (D.C. Cir. 1985) (internal question marks and citations omitted).

In support of its argument that the action it took pertaining to Caraballo was necessary to the effective performance of its representational duties, the Respondent cites: (1) its need to quickly fill job requests under the terms of the CBA; (2) a “notice and cure” requirement would be unduly burdensome; and (3) the General Counsel’s “position is inherently unfair and preferential.” (R. Br. 17.) The General Counsel counters that: (1) with minor adjustments to its referral system the Respondent could adhere to the notice and cure requirement with minimal disruption; (2) the Respondent’s referral system is amenable to manipulation rendering it biased and unfair; and (3) there is evidence that the Respondent acted in bad faith and arbitrarily because it referred similarly situated referents for jobs while refusing to refer Caraballo.

I do not find persuasive the General Counsel’s argument that the Respondent’s referral system can be restructured so that it would take only “slightly more time than it does at present” and is merely a “mild burden” on the Respondent. (GC Br. 15.) The changes the General Counsel suggests are: (1) TITAN would be programmed so that requests for new referrals would generate a list that includes people whose dues or fees were paid for the current month and prior month; and (2) Grajales would call referents in the order they appear on the list, notify a referent, if applicable, that the person is not current on dues or fee payment, and give the referent a “reasonable” period to make the payment or “explain that the dues have been withheld from a participating check-off employer.” (GC Br. 15.) Although these changes would ensure that referents similar to Caraballo would appear on the referral list, the General Counsel has not proven that these changes would not have a fundamental impact on the Respondent’s “effective performance of its function of representing its constituency.” The CBA section 5.6 sets forth different deadlines for the employer to notify the Respondent of its need for employees. For calls of less than 20 employees the Respondent must fill the job request within at least 24 hours in advance of the time the workers must report to the jobsite; 20 workers or more the Respondent has 48 hours to fulfill the request; and on calls of 40 or more workers, the Respondent has 72-hour notice. Saturday and Sunday are excluded from these time limits. (GC Exh. 8.) The Respondent notes that multiple job requests may be received daily, thereby increasing the urgency of responding to the job requests. The General Counsel suggests, without defining, that referents who are not current in their dues or fee payments be given a “reasonable period of time” to effectuate payment but does not explain or prove how this can be

accomplished, without undue disruption, on calls requesting workers report to the jobsite within 24 hours of the call.

Moreover, I find that the Respondent’s referral system was implemented in a uniform and unbiased manner; and there is no substantial evidence that the Respondent implemented its rule in bad faith or for arbitrary reasons. The General Counsel notes that Santiago did not appear on the call list, inferring that it was because he had not paid his dues for November at the time the list was printed and Grajales made the job referral calls. (GC Br. 15.) Nevertheless, Grajales referred him for a job as a forklift driver. (R. Exh. 5, 6; GC Exh. 5(i).) The General Counsel also points to another hiring hall user, Elizabeth Ortiz (Ortiz) (forklift driver), as an example of Caraballo being treated less favorably. According to the General Counsel, “Grajales would sometimes write in other individuals’ names and add them to the call list . . .” a practice she did in the case of Ortiz. The General Counsel points to documentation showing there was “no indication that [Ortiz]’ dues were paid, and who was also special insofar as Grajales left two messages within half an hour in an attempt to give [Ortiz] a referral, ultimately successfully.” (GC Br. 16.)

Despite the General Counsel’s argument to the contrary, the evidence shows that the Respondent uniformly applied its rule that users of the hiring hall had to be current in their dues or fees before being referred for work. First, the evidence does not support a finding that Santiago and Ortiz were similarly situated to Caraballo. Santiago was a priority referral and as such he would be called by the employer directly before referrals are requested through the hiring hall referral system. (GC Exh. 8, Article V; R. Exh. 5.) Moreover, there is no definitive evidence that Santiago was delinquent in his dues for the time period at issue. The General Counsel admits that its use of Santiago as a comparator was based on “an *inference* that the reason was that he had not yet paid his dues for November . . .” (Emphasis added.) Likewise, there is no evidence that Ortiz’ dues had not been paid for the relevant timeframe. The General Counsel argues because there is no indication that Ortiz’ dues were current when Grajales referred her for a job assignment, Ortiz was treated more favorably than Caraballo despite their similar payment status. I reject the General Counsel’s argument because the absence of the evidence does not establish its nonexistence. It simply means that the General Counsel, as part of its burden of proof, did not clearly establish that Ortiz was delinquent in her dues for the period at issue. 29 C.F.R. §101.10(b) The record contains no evidence showing that Ortiz had not paid her dues. Consequently, I find that the named employees are not similarly situated to Caraballo; and the General Counsel’s argument on this point also fails.

Based on the evidence, I find that the Respondent has overcome the presumption of illegality by establishing a necessity defense. Accordingly, I recommend dismissal of the complaint.

Dated: Washington, D.C. December 19, 2019